

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

SEAN KULL,

Plaintiff,

vs.

JO ANNE B. BARNHART ,  
Commissioner of Social Security,

Defendant.

3:06-CV-0239-BES (RAM)

**REPORT AND RECOMMENDATION  
OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Brian E. Sandoval, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4.

Plaintiff filed a motion for reversal of the commissioner's decision on September 14, 2006 (Doc. #11). Defendant opposed the motion and filed a cross-motion to affirm the commissioner's final decision on October 12, 2006 (Doc. #12).

**BACKGROUND**

Plaintiff Sean Kull filed an application for Disability Insurance Benefits (DIB) (Tr. 56-59, 229-232) on September 8, 2003 and an application for Supplemental Security Income (SSI) (Tr. 56-59, 229-232) on April 20, 2004. Plaintiff alleges disability, beginning on March 10, 2003, based on degenerative joint disease of the knees, hepatitis C and hypertension (Tr. 26). At his disability hearing on February 10, 2005, Plaintiff appeared and testified (Tr. 25). His attorney, Dennis A. Cameron, represented him at the hearing (*Id.*). The Administrative Law Judge (ALJ) found Plaintiff "Not Disabled" in the decision he issued (August 20, 2005)

1 (Tr. 25-32). Plaintiff appealed the decision (Tr. 21). The Appeals Council denied review (Tr.  
2 6-8). Thus, the ALJ's decision became the final decision of the Commissioner (Tr. 6-8).  
3 Plaintiff now appeals that decision (Doc. #11).

4 Plaintiff was fifty-six years old at the time of the decision and has eleven years of  
5 education (Tr. 26 ). His past work experience includes work as an apartment maintenance  
6 worker and bartender (*Id.*).

7 Both parties have stipulated that the ALJ fairly and accurately summarized the  
8 material evidence and testimony (Doc. #11 at 2, Doc. #12 at 2).

### 9 DISCUSSION

#### 10 A. Judicial Review - Substantial Evidence Standard

11 The court must affirm the ALJ's determination if it is based on proper legal standards  
12 and the findings are supported by substantial evidence in the record. *Smolen v. Charter*, 80  
13 F.3d 1273, 1279 (9th Cir. 1996). Substantial evidence is "more than a mere scintilla. It means  
14 such relevant evidence as a reasonable mind might accept as adequate to support a  
15 conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(quoting *Consolidated Edison*  
16 *Co. v. NLRB*, 305 U.S. 197, 229 (1938)). To determine whether substantial evidence exists,  
17 the court must look at the record as a whole, considering both evidence that supports and  
18 undermines the ALJ's decision. *Orteza v. Shalala*, 50 F. 3d 748, 749 (9th Cir. 1995).  
19 "However, if evidence is susceptible of more than one rational interpretation, the decision of  
20 the ALJ must be upheld." *Id.* The ALJ alone is responsible for determining credibility, and  
21 for resolving ambiguities. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999).

22 The initial burden of proof rests upon the claimant to establish disability. *Howard v.*  
23 *Heckler*, 782 F.2d 1484, 1486 (9th Cir. 1986); 20 C.F.R. § 404.1512(a). To meet this burden,  
24 a plaintiff must demonstrate an "inability to engage in any substantial gainful activity by  
25 reason of any medically determinable physical or mental impairment which can be expected  
26 ... to last for a continuous period of not less than 12 months ..." 42 U.S.C. §423 (d)(1)(A).

1       The Commissioner has established a five-step sequential process for determining  
2 whether a person is disabled. *Bowen v. Yuckert*, 482 U.S. 137, 140-41 (1987); see 20 C.F.R.  
3 §§ 404.1520, 416.920. In the first step, it must be determined whether the claimant is  
4 engaged in “substantially gainful activity”; if so, a finding of nondisability is made and the  
5 claim is denied. *Yuckert*, 482 U.S. at 140; 20 C.F.R. §§ 404.1520(b), 416.920(b). If the  
6 claimant is not engaged in substantially gainful activity, the second step requires determining  
7 whether his impairments or combinations of impairments are “severe.” *Yuckert*, 482 U.S. at  
8 140-41. If a claimant’s impairments are so slight that they cause no more than minimal  
9 functional limitations, it will be determined that the claimant does not have a severe  
10 impairment and is not disabled. 20 C.F.R. § 404.1520. If, however, it is found that the  
11 claimant’s impairments are severe, such impairments will be presumed to be sufficiently  
12 severe provided the impairments meet or equal the impairments described in the  
13 Commissioner’s Listing of Impairments and are of sufficient duration. *Id.* at § (d). If the  
14 claimant’s impairments meet or equal a listed impairment, the claimant is conclusively  
15 presumed disabled. *Id.* If the claimant’s impairments are severe, but do not meet or equal  
16 a listed impairment, the Commissioner proceeds to step four. *Yuckert*, 482 U.S. at 141. In  
17 step four, the Commissioner determines whether the claimant can still perform “past relevant  
18 work.” 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant can still do the work he or she  
19 did in the past, then the ALJ should determine that he or she is not disabled. 20 C.F.R. §  
20 404.1520(f). If he or she cannot perform past relevant work, the burden shifts to the  
21 Commissioner. *Yuckert*, 482 U.S. at 144. Finally, in step five, the Commissioner must  
22 establish that the claimant can perform work available in the national economy. *Id.* at 141-42;  
23 see 20 C.F.R. §§ 404.1520(e), 404.1520(f), 416.920(e), 416.920(f).

24       Application of steps four and five requires the ALJ review the claimant’s residual  
25 functional capacity and the physical and mental demands of the work he or she did in the  
26 past. 20 C.F.R. § 404.1520(f) & (g). “Residual functional capacity” (RFC) is what the  
27 individual can still do despite his limitations. 20 C.F.R. § 404.1545. If the individual cannot  
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1 do the work he did in the past, the ALJ must consider his RFC, age, education, and past work  
2 experience to determine whether he can do other work. *Id.* If the Commissioner establishes  
3 the claimant can do other work which exists in the national economy, then he or she is not  
4 disabled. 20 C.F.R. 404.1566.

5 B. Review of the ALJ's Decision

6 In the present case, the ALJ applied the five step sequential evaluation process. At  
7 step one he found the claimant was not engaged in substantially gainful activity (Tr. 28). The  
8 ALJ also found the medical evidence established the claimant has degenerative joint disease  
9 of the knees, status post left nephrectomy, alcoholism in remission since February 2004,  
10 Hepatitis C and hypertension (*Id.*). However, the ALJ concluded that these impairments did  
11 not meet or equal the level of severity of any impairments described in the Listing of  
12 Impairments (Appendix I, Subpart P, Regulation No. 4) either individually or in combination  
13 (Tr. 28-29). At step four, the ALJ determined that Plaintiff's impairments do not prevent him  
14 from performing his past relevant work as a bartender (Tr. 30).

15 In making his determination, the ALJ took into consideration Plaintiff's testimony,  
16 opinions of treating and non-treating examiners and conclusions of the state agency  
17 consultants (Tr. 29). The ALJ found Plaintiff's allegations, that standing is limited to an hour  
18 on a good day, walking is limited and sitting is difficult due to his knees, not fully credible (Tr.  
19 30). The ALJ based this determination on his finding that Plaintiff's description of pain,  
20 fatigue and limitations were not consistent with the medical records because the records only  
21 showed minimal or mild findings (*Id.*). Specifically, the ALJ found the record didn't support  
22 Plaintiff's allegations of fatigue caused by hepatitis because Plaintiff chose to stop interferon  
23 treatment and, had his hepatitis been more debilitating, he most likely would have been more  
24 motivated to stay on the treatment (Tr. 30). The ALJ found the record didn't support  
25 Plaintiff's allegations of severe knee pain because Plaintiff was given steroid injections for his  
26 knees, Plaintiff takes pain medication, and the record notes an improvement in Plaintiff's  
27 pain level (*Id.*).  
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1 C. Credibility Assessment

2 A claimant's credibility becomes important at the stage where the ALJ assesses the  
3 claimant's RFC. *Tonapetyan v. Halter*, 242 F.3d 1144, 1147 (9th Cir. 2001). Subjective  
4 symptom testimony may tell of greater limitations than medical evidence alone. *Id.* Thus, a  
5 claimant's credibility is often crucial to a finding of disability. *Id.* (citing Social Security Rule  
6 96-7p (1996)).

7 In general, when deciding whether to accept or reject a claimant's subjective symptom  
8 testimony, an ALJ must perform two stages of analysis: an analysis under *Cotton v. Bowen*,  
9 799 F.2d 1403 (9th Cir. 1986) (the "*Cotton* test") and an analysis of the credibility of the  
10 claimant's testimony regarding the severity of his or her symptoms. *Smolen*, 80 F.3d at 1281;  
11 see also 20 C.F.R. § 404.1529 (adopting two-part test). "If the claimant produces evidence  
12 to meet the *Cotton* test and there is no evidence of malingering, the ALJ can reject the  
13 claimant's testimony about the severity of his or her symptoms only by offering specific, clear,  
14 and convincing reasons for doing so." *Smolen*, 80 F.3d at 1281.

15 Under the *Cotton* test, a claimant who alleges disability based on subjective symptoms  
16 "must produce objective evidence of an underlying impairment 'which could reasonably be  
17 expected to produce the pain or other symptoms alleged.'" *Bunnell v. Sullivan*, 947 F.2d 341,  
18 344 (9th Cir. 1991)(en banc). This test "imposes only two requirements on the claimant: (1)  
19 [he or] she must produce objective medical evidence of an impairment or impairments; and  
20 (2) [he or] she must show that the impairment or combination of impairments *could*  
21 *reasonably be expected to* (not that it did in fact) produce some degree of symptom." *Smolen*,  
22 80 F.3d at 1282 (emphasis in original); see also 20 C.F.R. § 404.1529(a)-(b).

23 An ALJ's credibility findings are entitled to deference if they are supported by  
24 substantial evidence and are "sufficiently specific to allow a reviewing court to conclude the  
25 adjudicator rejected the claimant's testimony on permissible grounds and did not 'arbitrarily  
26 discredit a claimant's [symptom] testimony.'" *Bunnell*, 947 F.2d at 345-346 (quoting *Elam*  
27 *v. Railroad Retirement Bd.*, 921 F.2d 1210, 1215 (11th Cir. 1991). When analyzing credibility,  
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1 an ALJ may properly consider medical evidence in the analysis. *Rollins v. Massanari*, 261  
2 F.3d 853, 857 (9th Cir. 2001) (“While subjective pain testimony cannot be rejected on the sole  
3 ground that it is not fully corroborated by objective medical evidence, the medical evidence  
4 is still a relevant factor in determining the severity of the claimant's pain and its disabling  
5 effects.”); *see also Batson v. Commissioner of Soc. Sec.*, 359 F.3d 1190, 1196 (9th Cir.  
6 2003) (holding ALJ properly determined credibility where claimant's testimony was  
7 contradictory to and unsupported by objective medical evidence). “Factors that an ALJ may  
8 consider in weighing a claimant's credibility include reputation for truthfulness,  
9 inconsistencies in testimony or between testimony and conduct, daily activities, and  
10 unexplained, or inadequately explained, failure to seek treatment or follow a prescribed  
11 course of treatment.” *Orn v. Astrue*, \_\_\_\_ F.3d \_\_\_\_ (9th Cir. 2007), 2007 WL 2034287, 9  
12 (official citation not available).

13 Here, the ALJ determined Plaintiff suffers from medically determinable severe  
14 impairments; therefore, Plaintiff has satisfied the first prong of the *Cotton* test (Tr. 31). The  
15 record indicates there is no evidence of malingering and the ALJ made no such finding.  
16 Accordingly, in order to reject Plaintiff's testimony regarding the severity of his pain, the ALJ  
17 must offer specific, clear and convincing findings supported by the record.

18 The ALJ made very limited specific findings regarding Plaintiff's subjective pain  
19 testimony (Tr. 30). The ALJ concluded Plaintiff's description of pain, fatigue and limitations  
20 were not consistent with the medical records because the records show only minimal or mild  
21 findings (Tr. 30).

22 To support the conclusion that Plaintiff's subjective allegation of pain with regards to  
23 hepatitis was lacking in credibility, the ALJ speculated that Plaintiff would have been more  
24 motivated to stay on the interferon treatment, regardless of the side effects, if his hepatitis  
25 had been more debilitating (*Id.*). The evidence the ALJ relied on to conclude Plaintiff's  
26 complaints of fatigue were not credible included the fact that there was only one notation in  
27 the record of a complaint of fatigue, at which time Plaintiff sought treatment, and there was  
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1 no further follow-up after Plaintiff received instructions, in January 2005, on how to self-  
2 administer injections (Tr. 29).

3 At the February 10, 2005 hearing before the ALJ, Plaintiff testified the side effects of  
4 the self-administered injections include flu-like symptoms that basically keep you “well flat  
5 on your back” (Tr. 254-255). Other than speculating that Plaintiff would have stayed on the  
6 interferon treatment when first diagnosed had his hepatitis been more debilitating, the ALJ  
7 points to no medical evidence contradicting Plaintiff’s testimony that the self-administered  
8 shots, which is Plaintiff’s current course of treatment, would not produce the symptoms  
9 described by Plaintiff or evidence bringing into question Plaintiff’s reputation for  
10 truthfulness. The ALJ did not adequately address how Plaintiff’s failure to continue on the  
11 interferon treatment makes his testimony regarding fatigue associated with the self-  
12 administered injection treatment not fully credible. Plaintiff’s failure to follow the interferon  
13 treatment, without more, is not a clear and convincing finding supported by the record that  
14 Plaintiff’s symptom testimony regarding his current course of treatment is not fully credible.

15 To support the conclusion that Plaintiff’s subjective testimony regarding knee pain was  
16 not fully credible, the ALJ points to objective medical evidence that Plaintiff had been given  
17 steroid injections and takes pain medication (Tr. 30). Additionally, the ALJ points to  
18 objective medical evidence that Plaintiff was prescribed Oxycodone and the record notes his  
19 pain level was improved (*Id.*). When considering Plaintiff’s testimony regarding fatigue, the  
20 ALJ considered Plaintiff’s failure to follow a particular course of treatment as evidence of  
21 Plaintiff’s lack of credibility. However, when considering Plaintiff’s testimony regarding knee  
22 pain, the ALJ determined that because Plaintiff takes pain medication as prescribed by a  
23 doctor and the record notes his pain level improved, Plaintiff lacks credibility (Tr. 30).  
24 Plaintiff offered good reasons for taking pain medication and the fact that Plaintiff takes  
25 prescription pain medication for both knees lends support to his testimony that he can only  
26 stand for an hour on a good day, walking is limited and sitting is difficult due to his knees  
27 (*Id.*) Furthermore, the record indicates Plaintiff has a history of knee pain and, throughout  
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1 the record, there is evidence Plaintiff made complaints to various doctors and nurses about  
2 pain associated with one or both of his knees (Tr. 122-126, 129, 131, 165-166, 184, 201, 214-  
3 215). The ALJ's inference that because Plaintiff takes pain medication his testimony  
4 regarding the severity of his knee pain is not fully credible is not a clear and convincing  
5 finding supported by the record.

6 **RECOMMENDATION**

7 **IT IS HEREBY RECOMMENDED** that Plaintiff's Motion for Reversal of the  
8 Commissioner's Decision (Doc #11) be **GRANTED**.

9 **IT IS FURTHER RECOMMENDED** that the Defendant's Cross-Motion to Affirm  
10 the Commissioner's Decision (Doc #12) be **DENIED**, and that the decision of the ALJ be  
11 **REVERSED AND REMANDED** for further proceedings consistent with this  
12 Recommendation.

13 DATED: August 24, 2007.



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15 UNITED STATES MAGISTRATE JUDGE  
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